

STATE OF MICHIGAN
COURT OF APPEALS

A. TYRONE MORRIS,

Plaintiff/Counterdefendant-
Appellant,

v

LAPEER COUNTY ROAD COMMISSION,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

March 9, 2006

No. 256328

Lapeer Circuit Court

LC No. 02-031437-CH

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendant's motion for summary disposition on his claims for trespass and unlawful taking. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition, which was brought pursuant to MCR 2.116(C)(7), (8), and (10), because he pleaded facts sufficient to avoid governmental immunity. We disagree. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack v City of Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002).

Plaintiff's complaint describes defendant's alleged conduct of trespass, but plaintiff clearly failed to either plead a claim that fits within a statutory exception or facts that show the alleged torts occurred during defendant's discharge of a nongovernmental or proprietary activity. Although plaintiff appears to have been trying to avoid governmental immunity by alleging a trespass-nuisance exception, the Michigan Supreme Court has determined that the plain language of the governmental tort liability act does not contain a trespass-nuisance exception. *Pohutski v Allen Park*, 465 Mich 675, 690; 641 NW2d 219 (2002). Plaintiff first raised the gross negligence exception to governmental immunity in his response to defendant's motion for summary disposition. This Court has determined that the gross negligence exception to governmental immunity applies to officers, employees, members, or volunteers of governmental agencies. *Gracey v Wayne County Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled on other grounds in *American Transmissions, Inc v Attorney General*, 454 Mich 135; 560 NW2d 50

(1997). However, “[t]he exception does not state that it applies to the governmental agencies themselves.” *Id.* Plaintiff named Lapeer County Road Commission as the only defendant, failing to name an individual defendant. Based on *Gracey*, we find that plaintiff failed to state a claim under the gross negligence exception since he did not name any of the Commission’s employees as defendants.

Further, plaintiff raised the argument that defendant was engaged in a “nongovernmental function” for the first time in response to defendant’s motion for summary disposition. A “governmental function” is defined as an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.” *Mack, supra* at 204. However, there are no facts in the complaint alleging that defendant was engaged in an unauthorized activity. For a motion under MCR 2.116(C)(7), the court “must review the complaint to determine whether the plaintiff has pleaded facts justifying application of an exception to governmental immunity.” *Johnson v City of Detroit*, 457 Mich 695, 700-701; 579 MW2d 895 (1998). Accepting the contents of the complaint as true, plaintiff failed to allege facts necessary to demonstrate that defendant was engaged in a “nongovernmental function.” Therefore, the trial court correctly dismissed plaintiff’s trespass claim under MCR 2.116(C)(7) because it did not fit within a statutory exception to governmental immunity and plaintiff did not plead facts sufficient to show that defendant was engaged in a nongovernmental function.

Plaintiff also brought a claim for unlawful taking. “A plaintiff alleging a de facto taking or inverse condemnation must prove ‘that the government’s actions were a *substantial* cause of the decline of his property’s value’ and also ‘establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff’s property.’” *Hinojosa v Dep’t of Natural Resources*, 263 Mich App 537, 556-557; 688 NW2d 550 (2004) (citations omitted). Because plaintiff failed to plead, or submit documentary evidence showing, that defendant’s actions were a substantial cause of the decline in the value of plaintiff’s property, the trial court did not err in dismissing this claim.

Plaintiff next contends that he should have been given the opportunity to amend his complaint. Because an amendment would have been futile with regard to the trespass-nuisance claim and because plaintiff does not explain how an amended complaint would have corrected the deficiencies in his claim of unlawful taking, the trial court did not abuse its discretion in denying plaintiff the opportunity to amend his complaint. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 138; 627 NW2d 633 (2003); *Yudashkin v Linzmeyer (On Remand)*, 247 Mich App 642, 651; 637 NW2d 257 (2001); MCR 2.116(I)(5).

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Jane E. Markey